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INTERSTATE COMMERCE COMMISSION

AGREEMENT AND ASSIGNMENT

Dated as of December 20, 1978

Among

ACF INDUSTRIES, INC.  
and  
ORTNER FREIGHT CAR COMPANY

Manufacturers

And

✓ FIRST SECURITY BANK OF UTAH, N.A.  
Agent and Assignee

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(KATY No. 79-1)  
(100 Covered Hopper & 100 Gondola Cars)

## TABLE OF CONTENTS

<u>Section</u>	<u>Heading</u>	<u>Page</u>
Parties.....		1
1.	Assignment by Manufacturers.....	1
2.	Covenants and Agreements of Manufacturers.....	2
3.	Equipment Markings.....	4
4.	Recordation.....	4
5.	Conditions Precedent to Payments by Assignee.....	4
6.	Further Assignments.....	5
7.	Representation of Manufacturers; Further Assurances .....	5
8.	Governing Law.....	5
9.	Several Obligations.....	6
10.	Execution in Counterparts.....	6
Signature Page.....		6
Acknowledgments.....		7

## AGREEMENT AND ASSIGNMENT

AGREEMENT AND ASSIGNMENT dated as of December 20, 1978 among ACF INDUSTRIES, and ORTNER FREIGHT CAR COMPANY (hereinafter sometimes collectively referred to as the "Manufacturers" and individually as a "Manufacturer") and FIRST SECURITY BANK OF UTAH, N.A., acting not in its individual capacity but solely as agent and assignee under the Participation Agreement hereinafter referred to (said Bank as so acting being hereinafter called the "Assignee");

WHEREAS, the Manufacturers and FIRST MARYLAND LEASECORP (the "Vendee") have entered into a Conditional Sale Agreement dated as of December 20, 1978 (the "Conditional Sale Agreement") covering the construction, sale and delivery on the conditions therein set forth by the Manufacturers and the purchase by the Vendee of the railroad equipment described in Schedules A and B to the Conditional Sale Agreement (collectively the "Equipment" and individually an "Item" or "Item of Equipment"); and

WHEREAS, the Vendee and MISSOURI-KANSAS-TEXAS RAILROAD COMPANY (the "Lessee") have entered into an Equipment Lease dated as of December 20, 1978 (the "Lease") providing for the lease of the Equipment to the Lessee; and

WHEREAS, the Assignee, the Lessee, the Vendee and the institutional investors named therein in Schedule 1 thereto (the "Investors") have entered into a Participation Agreement dated as of December 20, 1978 (the "Participation Agreement") providing for the acquisition from the Manufacturers by the Assignee of the right, title and interest of the Manufacturers under the Conditional Sale Agreement, subject to the conditions set forth below.

NOW, THEREFORE, THIS AGREEMENT AND ASSIGNMENT (the "Assignment"):

### W I T N E S S E T H:

That, in consideration of the sum of One Dollar (\$1.00) and other good and valuable consideration paid by the Assignee to the Manufacturers, the receipt of which is hereby acknowledged, as well as of the mutual covenants herein contained:

Section 1. Assignment by Manufacturers. Each Manufacturer hereby assigns, transfers and sets over unto the Assignee, its successors and assigns:

(a) All the right, security title and interest of such Manufacturer in and to each Item of Equipment to be built by it when and as delivered and accepted and upon payment by the Assignee to such Manufacturer of the amount required to be paid under Section 5 hereof;

(b) All the right, title and interest of such Manufacturer in and to the Conditional Sale Agreement (except the right to construct and deliver the various Items of Equipment to be built by it pursuant to Sections 1 and 2.1 thereof and the right to receive the payments specified in Section 3.3(a) thereof and reimbursement for taxes paid or incurred by such Manufacturer and all rights to indemnity from the Vendee and/or the Lessee for claims arising against such Manufacturer), and in and to any and all amounts which may be or become due or owing to such Manufacturer under the Conditional Sale Agreement on account of the indebtedness in respect of the Purchase Price (as defined in the Conditional Sale Agreement) of the Equipment and interest thereon, and in and to any other sums becoming due from the Vendee under the Conditional Sale Agreement, other than those hereinabove excluded; and

(c) Except as limited above in subparagraph (b) hereof, all of such Manufacturer's rights, powers, privileges and remedies under the Conditional Sale Agreement;

without any recourse, however, against such Manufacturer for or on account of the failure of the Vendee to make any of the payments provided for in, or otherwise to comply with, any of the provisions of the Conditional Sale Agreement; provided, however, that this Assignment shall not subject the Assignee to, or transfer or pass, or in any way affect or modify the obligations of such Manufacturer to construct and deliver the various Items of Equipment in accordance with the Conditional Sale Agreement or with respect to its warranties and agreements contained in Sections 10.3 and 11 of the Conditional Sale Agreement or relieve the Vendee from its obligations to the Manufacturer under Sections 2, 3.3(a), 10 and 12 of the Conditional Sale Agreement, it being understood and agreed that notwithstanding this Assignment, or any subsequent assignment pursuant to the provisions of Section 12 of the Conditional Sale Agreement, all obligations of such Manufacturer to the Vendee shall be and remain enforceable by the Vendee, its successors and assigns, against and only against such Manufacturer. In furtherance of the foregoing assignment and transfer, each Manufacturer hereby authorizes and empowers the Assignee in the Assignee's own name, or in the name of the Assignee's nominee, or in the name of and as attorney, hereby irrevocably constituted, for such Manufacturer to ask, demand, sue for, collect, receive and enforce any and all sums to which the Assignee is or may become entitled under this Assignment and compliance by the Vendee with the terms and agreements on its part to be performed under the Conditional Sale Agreement, but at the expense and liability and for the sole benefit of the Assignee (it being understood that such agreement with respect to the expense and liability of enforcement shall in no event be construed as a waiver of the Assignee's rights with respect thereto under Section 15 of the Conditional Sale Agreement and Section 14.2 of the Lease (as defined in the Conditional Sale Agreement)).

Section 2. Covenants and Agreements of Manufacturers.  
Each Manufacturer covenants and agrees that it will deliver the

various Items of Equipment to be manufactured by it to the Vendee, in accordance with the provisions of the Conditional Sale Agreement, and that, notwithstanding this Assignment, it will perform and fully comply with each and all of the covenants and conditions of the Conditional Sale Agreement set forth to be performed and complied with by such Manufacturer. Each Manufacturer further covenants and agrees that it will warrant to the Assignee and the Vendee that at the time of delivery of each Item of Equipment to be manufactured by it to the Vendee under the Conditional Sale Agreement it had legal title to such Item and good and lawful right to sell such Item and the title to such Item was free of all claims, liens and encumbrances of any nature except only the right of such Manufacturer to receive payment of its invoice price therefor and the rights of the Vendee under the Conditional Sale Agreement and the rights of the Lessee under the Lease; and such Manufacturer further covenants and agrees that it will defend the title to such Item against the demands of all persons whomsoever based on claims originating prior to said delivery of such Item by such Manufacturer to the Vendee; all subject, however, to the provisions of the Conditional Sale Agreement and the rights of the Railroad thereunder and of the Lessee under the Lease.

Each Manufacturer covenants and agrees with the Assignee that in any suit, proceeding or action brought by the Assignee under the Conditional Sale Agreement for any installment of, or interest on, indebtedness in respect of the Purchase Price of the Equipment or to enforce any provision of the Conditional Sale Agreement, such Manufacturer will indemnify, protect and hold harmless the Assignee from and against all expense, loss or damage suffered by reason of any defense, set-off, counterclaim or recoupment whatsoever of the Vendee arising out of a breach by such Manufacturer of any obligation with respect to the Equipment or the manufacture, construction, delivery or warranty thereof by such Manufacturer, or under Sections 10 or 11 of the Conditional Sale Agreement, or by reason of any defense, set-off, counterclaim or recoupment whatsoever arising by reason of any other indebtedness or liability at any time owing to the Vendee by such Manufacturer. Each Manufacturer's obligation so to indemnify, protect and hold harmless the Assignee is conditional upon (a) the Assignee's timely motion or other appropriate action, on the basis of Section 12.4 of the Conditional Sale Agreement, to strike any defense, set-off, counterclaim or recoupment asserted by the Vendee in any such suit, proceeding or action and (b) if the court or other body having jurisdiction in such suit, proceeding or action denies such motion or other action and accepts such defense, set-off, counterclaim or recoupment as a triable issue in such proceeding or action, the Assignee's prompt notification to the Manufacturer of the asserted defense, set-off, counterclaim or recoupment and the Assignee's giving such Manufacturer the right, at such Manufacturer's expense, to compromise, settle or defend against such defense, set-off, counterclaim or recoupment. Any and all such obligations shall be and remain enforceable according to their merits by the Vendee or the Lessee against and only against the Manufacturers and shall not be enforceable against the Assignee or any party or parties in whom security title to the Equipment or any unit

thereof or any of the rights of the Manufacturers under the Conditional Sale Agreement shall vest by reason of this Assignment or of successive assignments. The Assignee will give notice to the Manufacturers of any suit, proceeding or action by the Assignee herein described.

Except in cases of designs, systems, processes, formulas or combinations specified by the Vendee or the Lessee and not developed or purported to be developed by the Manufacturer, and articles and materials specified by the Vendee and the Lessee and not manufactured by the Manufacturer, each Manufacturer agrees to indemnify, protect and hold harmless the Assignee from and against any and all liability, claims, demands, costs, charges and expenses, including reasonable royalty payments and counsel fees, in any manner imposed upon or accruing against the Assignee or its assigns because of the use in or about the construction or operation of the Equipment, or any Item thereof, of any design, system, process, formula, combination, article or material which infringes or is claimed to infringe on any patent or other right. The Assignee will give notice to the Manufacturer of any claim actually known to the Assignee which is based upon any such alleged infringement and will give the Manufacturer the right, at the Manufacturer's expense, to compromise, settle or defend against such claim.

Each Manufacturer agrees that any amount payable to it by the Vendee or the Lessee, whether pursuant to the Conditional Sale Agreement or otherwise, not hereby assigned to the Assignee, shall not be secured by any lien or charge on any Item of Equipment.

Section 3. Equipment Markings. Each Manufacturer will cause to be plainly, distinctly, permanently and conspicuously marked by a plate or stencil in contrasting color on both sides of each Item of Equipment to be built by it, at the time of delivery thereof to the Vendee, in letters not less than one inch in height, the following legend:

"Unit Subject to Security Interest of  
Agent Bank under Conditional Sale Agreement  
Recorded with the I.C.C."

Section 4. Recordation. Upon request of the Assignee, its successors and assigns, each Manufacturer will execute and deliver all instruments which may be necessary or proper in order to discharge of record the Conditional Sale Agreement or any other instrument evidencing any interest of such Manufacturer therein or in the Equipment.

Section 5. Conditions Precedent to Payments by Assignee. Subject to the conditions set forth in the Participation Agreement, the Assignee, on or before noon on each Closing Date fixed as provided in Section 3.4 of the Conditional Sale Agreement with respect to a Group (as defined in Section 3.2 of said Agreement) of Equipment, shall pay to the Manufacturer at the office of the Assignee at 79 South Main Street, Salt Lake City, Utah, Attention: Corporate Trust Department, an amount equal to 66.7407% of the aggregate Purchase Price for all Items of Equipment in such Group for

which settlement is then being made, provided that the obligation of the Assignee hereunder to make payment for any Group of Equipment is hereby expressly conditioned upon the prior timely receipt by the Assignee, pursuant to the Participation Agreement, of all the funds to be furnished to the Assignee by the various parties to the Participation Agreement with respect thereto and evidence reasonably satisfactory to it and its counsel that each of the conditions precedent set forth in the Participation Agreement have been met. In the event that the Assignee shall not make any such payment, the Assignee shall reassign to the Manufacturer, without recourse to the Assignee, all right, security title and interest of the Assignee in and to the Items of Equipment with respect to which payment has not been made by the Assignee.

It is understood and agreed that the Assignee shall not be required to make any payment with respect to any Items of Equipment excluded from the Conditional Sale Agreement pursuant to Sections 2.3 and 3.1 thereof.

Section 6. Further Assignments. Subject to the terms and provisions of the Participation Agreement, the Assignee may assign in the entirety all of its rights under the Conditional Sale Agreement, including the right to receive any payments due or to become due to it from the Vendee thereunder. In the event of any such assignment each such subsequent or successive assignee shall, to the extent of such assignment, enjoy all the rights and privileges and be subject to all the obligations of the Assignee hereunder.

Section 7. Representation of Manufacturers; Further Assurances. Each Manufacturer hereby:

(a) represents and warrants to the Assignee, its successors and assigns, that the Conditional Sale Agreement was duly authorized and lawfully executed and delivered by it for a valid consideration, that (assuming due authorization, execution and delivery by the other parties thereto) it is a valid and existing agreement binding upon such Manufacturer and the other parties thereto, and that it is now in force without amendment thereto; and

(b) covenants and agrees that it will from time to time and at all times, at the request of the Assignee or its successors or assigns, make, execute and deliver all such further instruments of assignment, transfer and assurance and do such further acts and things as may be necessary and appropriate in the premises to give effect to the provisions hereinabove set forth and more perfectly to confirm the rights, security titles and interests hereby assigned and transferred to the Assignee or intended so to be.

Section 8. Governing Law. The terms of this Assignment and all rights and obligations hereunder shall be governed by the laws of the State of Maryland; provided, however, that the parties

shall be entitled to all the rights conferred by 49 USC Section 11303 of the Interstate Commerce Act and such additional rights arising out of the filing, recording or depositing of the Conditional Sale Agreement and this Assignment as shall be conferred by the laws of the several jurisdictions in which the Conditional Sale Agreement or this Assignment shall be filed, recorded or deposited.

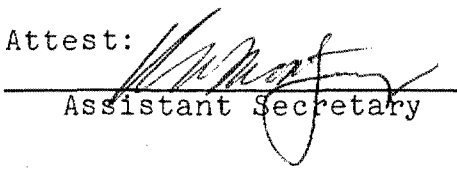
Section 9. Several Obligations. The rights and undertakings of each Manufacturer and the rights and obligations of the Assignee with respect to each Manufacturer hereunder are several and not joint.

Section 10. Execution in Counterparts. This Assignment may be executed in any number of counterparts, all of which together shall constitute a single instrument. It shall not be necessary that any counterpart be signed by all of the parties hereto so long as at least one counterpart is signed by each party hereto. The Assignee agrees to deliver one of such counterparts, or a certified copy thereof, to the Vendee and the Lessee. Although this Assignment is dated for convenience as of the date first above written, the actual date or dates of execution hereof by the parties hereto is or are, respectively, the date or dates stated in the acknowledgments hereto annexed.

IN WITNESS WHEREOF, each Manufacturer and the Assignee have caused these presents to be executed in their respective corporate names by officers or representatives duly authorized, and their respective corporate seals to be affixed and duly attested, all as of the day, month and year first above written.


(Corporate Seal)

Attest:

  
Assistant Secretary

ACF INDUSTRIES, INC.

By

  
Vice President  
TREASURER

Attest:

\_\_\_\_\_  
Assistant Secretary

ORTNER FREIGHT CAR COMPANY

By

\_\_\_\_\_  
Vice President

(Corporate Seal)

Attest:

\_\_\_\_\_  
Authorized Officer

FIRST SECURITY BANK OF UTAH, N.A.,  
not in its individual capacity,  
but solely as Agent and Assignee

By

\_\_\_\_\_  
Authorized Officer



STATE OF NEW YORK     )  
                              ) SS  
COUNTY OF NEW YORK    )

On this 12<sup>th</sup> day of April, 1979, before me personally appeared H. A. BORST, to me personally known, who, being by me duly sworn, says that he is ~~TREASURER~~ Vice President of ACF INDUSTRIES, INC., that one of the seals affixed to the foregoing instrument is the corporate seal of said corporation, that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and he acknowledged that the execution of the foregoing instrument was the free act and deed of said corporation.

Edwin F. Meyer  
Notary Public

(Seal)

EDWIN F. MEYER  
NOTARY PUBLIC, State of New York  
No. 30-7917803  
Qualified in Nassau County  
Certificate filed in New York County  
Commission Expires March 30, 1980

My Commission Expires:

STATE OF OHIO     )  
                              ) SS  
COUNTY OF HAMILTON    )

On this \_\_\_\_\_ day of \_\_\_\_\_, 1979, before me personally appeared \_\_\_\_\_, to me personally known, who, being by me duly sworn, says that he is a Vice President of ORTNER FREIGHT CAR COMPANY, that one of the seals affixed to the foregoing instrument is the corporate seal of said corporation, that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and he acknowledged that the execution of the foregoing instrument was the free act and deed of said corporation.

\_\_\_\_\_  
Notary Public

(Seal)

My Commission Expires:

STATE OF UTAH                    )  
                                  )  SS  
COUNTY OF SALT LAKE        )

On this \_\_\_\_ day of \_\_\_\_\_, 1979, before me personally appeared \_\_\_\_\_, to me personally known, who, being by me duly sworn, says that he is an Authorized Officer of FIRST SECURITY BANK OF UTAH, N.A., that one of the seals affixed to the foregoing instrument is the corporate seal of said corporation, that said instrument was signed and sealed on behalf of said association by authority of its Board of Directors, and he acknowledged that the execution of the foregoing instrument was the free act and deed of said corporation.

(SEAL)

\_\_\_\_\_  
Notary Public

My Commission Expires:

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AGREEMENT AND ASSIGNMENT

Dated as of December 20, 1978

Among

ACF INDUSTRIES, INC.  
and  
ORTNER FREIGHT CAR COMPANY

Manufacturers

And

FIRST SECURITY BANK OF UTAH, N.A.  
Agent and Assignee

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(KATY No. 79-1)  
(100 Covered Hopper & 100 Gondola Cars)

TABLE OF CONTENTS

<u>Section</u>	<u>Heading</u>	<u>Page</u>
Parties.....		1
1.	Assignment by Manufacturers.....	1
2.	Covenants and Agreements of Manufacturers.....	2
3.	Equipment Markings.....	4
4.	Recordation.....	4
5.	Conditions Precedent to Payments by Assignee.....	4
6.	Further Assignments.....	5
7.	Representation of Manufacturers; Further Assurances .....	5
8.	Governing Law.....	5
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Signature Page.....		6
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## AGREEMENT AND ASSIGNMENT

AGREEMENT AND ASSIGNMENT dated as of December 20, 1978 among ACF INDUSTRIES, and ORTNER FREIGHT CAR COMPANY (hereinafter sometimes collectively referred to as the "Manufacturers" and individually as a "Manufacturer") and FIRST SECURITY BANK OF UTAH, N.A., acting not in its individual capacity but solely as agent and assignee under the Participation Agreement hereinafter referred to (said Bank as so acting being hereinafter called the "Assignee");

WHEREAS, the Manufacturers and FIRST MARYLAND LEASECORP (the "Vendee") have entered into a Conditional Sale Agreement dated as of December 20, 1978 (the "Conditional Sale Agreement") covering the construction, sale and delivery on the conditions therein set forth by the Manufacturers and the purchase by the Vendee of the railroad equipment described in Schedules A and B to the Conditional Sale Agreement (collectively the "Equipment" and individually an "Item" or "Item of Equipment"); and

WHEREAS, the Vendee and MISSOURI-KANSAS-TEXAS RAILROAD COMPANY (the "Lessee") have entered into an Equipment Lease dated as of December 20, 1978 (the "Lease") providing for the lease of the Equipment to the Lessee; and

WHEREAS, the Assignee, the Lessee, the Vendee and the institutional investors named therein in Schedule 1 thereto (the "Investors") have entered into a Participation Agreement dated as of December 20, 1978 (the "Participation Agreement") providing for the acquisition from the Manufacturers by the Assignee of the right, title and interest of the Manufacturers under the Conditional Sale Agreement, subject to the conditions set forth below.

NOW, THEREFORE, THIS AGREEMENT AND ASSIGNMENT (the "Assignment"):

### W I T N E S S E T H:

That, in consideration of the sum of One Dollar (\$1.00) and other good and valuable consideration paid by the Assignee to the Manufacturers, the receipt of which is hereby acknowledged, as well as of the mutual covenants herein contained:

Section 1. Assignment by Manufacturers. Each Manufacturer hereby assigns, transfers and sets over unto the Assignee, its successors and assigns:

(a) All the right, security title and interest of such Manufacturer in and to each Item of Equipment to be built by it when and as delivered and accepted and upon payment by the Assignee to such Manufacturer of the amount required to be paid under Section 5 hereof;

(b) All the right, title and interest of such Manufacturer in and to the Conditional Sale Agreement (except the right to construct and deliver the various Items of Equipment to be built by it pursuant to Sections 1 and 2.1 thereof and the right to receive the payments specified in Section 3.3(a) thereof and reimbursement for taxes paid or incurred by such Manufacturer and all rights to indemnity from the Vendee and/or the Lessee for claims arising against such Manufacturer), and in and to any and all amounts which may be or become due or owing to such Manufacturer under the Conditional Sale Agreement on account of the indebtedness in respect of the Purchase Price (as defined in the Conditional Sale Agreement) of the Equipment and interest thereon, and in and to any other sums becoming due from the Vendee under the Conditional Sale Agreement, other than those hereinabove excluded; and

(c) Except as limited above in subparagraph (b) hereof, all of such Manufacturer's rights, powers, privileges and remedies under the Conditional Sale Agreement;

without any recourse, however, against such Manufacturer for or on account of the failure of the Vendee to make any of the payments provided for in, or otherwise to comply with, any of the provisions of the Conditional Sale Agreement; provided, however, that this Assignment shall not subject the Assignee to, or transfer or pass, or in any way affect or modify the obligations of such Manufacturer to construct and deliver the various Items of Equipment in accordance with the Conditional Sale Agreement or with respect to its warranties and agreements contained in Sections 10.3 and 11 of the Conditional Sale Agreement or relieve the Vendee from its obligations to the Manufacturer under Sections 2, 3.3(a), 10 and 12 of the Conditional Sale Agreement, it being understood and agreed that notwithstanding this Assignment, or any subsequent assignment pursuant to the provisions of Section 12 of the Conditional Sale Agreement, all obligations of such Manufacturer to the Vendee shall be and remain enforceable by the Vendee, its successors and assigns, against and only against such Manufacturer. In furtherance of the foregoing assignment and transfer, each Manufacturer hereby authorizes and empowers the Assignee in the Assignee's own name, or in the name of the Assignee's nominee, or in the name of and as attorney, hereby irrevocably constituted, for such Manufacturer to ask, demand, sue for, collect, receive and enforce any and all sums to which the Assignee is or may become entitled under this Assignment and compliance by the Vendee with the terms and agreements on its part to be performed under the Conditional Sale Agreement, but at the expense and liability and for the sole benefit of the Assignee (it being understood that such agreement with respect to the expense and liability of enforcement shall in no event be construed as a waiver of the Assignee's rights with respect thereto under Section 15 of the Conditional Sale Agreement and Section 14.2 of the Lease (as defined in the Conditional Sale Agreement)).

Section 2. Covenants and Agreements of Manufacturers.  
Each Manufacturer covenants and agrees that it will deliver the

various Items of Equipment to be manufactured by it to the Vendee, in accordance with the provisions of the Conditional Sale Agreement, and that, notwithstanding this Assignment, it will perform and fully comply with each and all of the covenants and conditions of the Conditional Sale Agreement set forth to be performed and complied with by such Manufacturer. Each Manufacturer further covenants and agrees that it will warrant to the Assignee and the Vendee that at the time of delivery of each Item of Equipment to be manufactured by it to the Vendee under the Conditional Sale Agreement it had legal title to such Item and good and lawful right to sell such Item and the title to such Item was free of all claims, liens and encumbrances of any nature except only the right of such Manufacturer to receive payment of its invoice price therefor and the rights of the Vendee under the Conditional Sale Agreement and the rights of the Lessee under the Lease; and such Manufacturer further covenants and agrees that it will defend the title to such Item against the demands of all persons whomsoever based on claims originating prior to said delivery of such Item by such Manufacturer to the Vendee; all subject, however, to the provisions of the Conditional Sale Agreement and the rights of the Railroad thereunder and of the Lessee under the Lease.

Each Manufacturer covenants and agrees with the Assignee that in any suit, proceeding or action brought by the Assignee under the Conditional Sale Agreement for any installment of, or interest on, indebtedness in respect of the Purchase Price of the Equipment or to enforce any provision of the Conditional Sale Agreement, such Manufacturer will indemnify, protect and hold harmless the Assignee from and against all expense, loss or damage suffered by reason of any defense, set-off, counterclaim or recoupment whatsoever of the Vendee arising out of a breach by such Manufacturer of any obligation with respect to the Equipment or the manufacture, construction, delivery or warranty thereof by such Manufacturer, or under Sections 10 or 11 of the Conditional Sale Agreement, or by reason of any defense, set-off, counterclaim or recoupment whatsoever arising by reason of any other indebtedness or liability at any time owing to the Vendee by such Manufacturer. Each Manufacturer's obligation so to indemnify, protect and hold harmless the Assignee is conditional upon (a) the Assignee's timely motion or other appropriate action, on the basis of Section 12.4 of the Conditional Sale Agreement, to strike any defense, set-off, counterclaim or recoupment asserted by the Vendee in any such suit, proceeding or action and (b) if the court or other body having jurisdiction in such suit, proceeding or action denies such motion or other action and accepts such defense, set-off, counterclaim or recoupment as a triable issue in such proceeding or action, the Assignee's prompt notification to the Manufacturer of the asserted defense, set-off, counterclaim or recoupment and the Assignee's giving such Manufacturer the right, at such Manufacturer's expense, to compromise, settle or defend against such defense, set-off, counterclaim or recoupment. Any and all such obligations shall be and remain enforceable according to their merits by the Vendee or the Lessee against and only against the Manufacturers and shall not be enforceable against the Assignee or any party or parties in whom security title to the Equipment or any unit

thereof or any of the rights of the Manufacturers under the Conditional Sale Agreement shall vest by reason of this Assignment or of successive assignments. The Assignee will give notice to the Manufacturers of any suit, proceeding or action by the Assignee herein described.

Except in cases of designs, systems, processes, formulas or combinations specified by the Vendee or the Lessee and not developed or purported to be developed by the Manufacturer, and articles and materials specified by the Vendee and the Lessee and not manufactured by the Manufacturer, each Manufacturer agrees to indemnify, protect and hold harmless the Assignee from and against any and all liability, claims, demands, costs, charges and expenses, including reasonable royalty payments and counsel fees, in any manner imposed upon or accruing against the Assignee or its assigns because of the use in or about the construction or operation of the Equipment, or any Item thereof, of any design, system, process, formula, combination, article or material which infringes or is claimed to infringe on any patent or other right. The Assignee will give notice to the Manufacturer of any claim actually known to the Assignee which is based upon any such alleged infringement and will give the Manufacturer the right, at the Manufacturer's expense, to compromise, settle or defend against such claim.

Each Manufacturer agrees that any amount payable to it by the Vendee or the Lessee, whether pursuant to the Conditional Sale Agreement or otherwise, not hereby assigned to the Assignee, shall not be secured by any lien or charge on any Item of Equipment.

Section 3. Equipment Markings. Each Manufacturer will cause to be plainly, distinctly, permanently and conspicuously marked by a plate or stencil in contrasting color on both sides of each Item of Equipment to be built by it, at the time of delivery thereof to the Vendee, in letters not less than one inch in height, the following legend:

"Unit Subject to Security Interest of  
Agent Bank under Conditional Sale Agreement  
Recorded with the I.C.C."

Section 4. Recordation. Upon request of the Assignee, its successors and assigns, each Manufacturer will execute and deliver all instruments which may be necessary or proper in order to discharge of record the Conditional Sale Agreement or any other instrument evidencing any interest of such Manufacturer therein or in the Equipment.

Section 5. Conditions Precedent to Payments by Assignee. Subject to the conditions set forth in the Participation Agreement, the Assignee, on or before noon on each Closing Date fixed as provided in Section 3.4 of the Conditional Sale Agreement with respect to a Group (as defined in Section 3.2 of said Agreement) of Equipment, shall pay to the Manufacturer at the office of the Assignee at 79 South Main Street, Salt Lake City, Utah, Attention: Corporate Trust Department, an amount equal to 66.7407% of the aggregate Purchase Price for all Items of Equipment in such Group for



which settlement is then being made, provided that the obligation of the Assignee hereunder to make payment for any Group of Equipment is hereby expressly conditioned upon the prior timely receipt by the Assignee, pursuant to the Participation Agreement, of all the funds to be furnished to the Assignee by the various parties to the Participation Agreement with respect thereto and evidence reasonably satisfactory to it and its counsel that each of the conditions precedent set forth in the Participation Agreement have been met. In the event that the Assignee shall not make any such payment, the Assignee shall reassign to the Manufacturer, without recourse to the Assignee, all right, security title and interest of the Assignee in and to the Items of Equipment with respect to which payment has not been made by the Assignee.

It is understood and agreed that the Assignee shall not be required to make any payment with respect to any Items of Equipment excluded from the Conditional Sale Agreement pursuant to Sections 2.3 and 3.1 thereof.

Section 6. Further Assignments. Subject to the terms and provisions of the Participation Agreement, the Assignee may assign in the entirety all of its rights under the Conditional Sale Agreement, including the right to receive any payments due or to become due to it from the Vendee thereunder. In the event of any such assignment each such subsequent or successive assignee shall, to the extent of such assignment, enjoy all the rights and privileges and be subject to all the obligations of the Assignee hereunder.

Section 7. Representation of Manufacturers; Further Assurances. Each Manufacturer hereby:

(a) represents and warrants to the Assignee, its successors and assigns, that the Conditional Sale Agreement was duly authorized and lawfully executed and delivered by it for a valid consideration, that (assuming due authorization, execution and delivery by the other parties thereto) it is a valid and existing agreement binding upon such Manufacturer and the other parties thereto, and that it is now in force without amendment thereto; and

(b) covenants and agrees that it will from time to time and at all times, at the request of the Assignee or its successors or assigns, make, execute and deliver all such further instruments of assignment, transfer and assurance and do such further acts and things as may be necessary and appropriate in the premises to give effect to the provisions hereinabove set forth and more perfectly to confirm the rights, security titles and interests hereby assigned and transferred to the Assignee or intended so to be.

Section 8. Governing Law. The terms of this Assignment and all rights and obligations hereunder shall be governed by the laws of the State of Maryland; provided, however, that the parties

shall be entitled to all the rights conferred by 49 USC Section 11303 of the Interstate Commerce Act and such additional rights arising out of the filing, recording or depositing of the Conditional Sale Agreement and this Assignment as shall be conferred by the laws of the several jurisdictions in which the Conditional Sale Agreement or this Assignment shall be filed, recorded or deposited.

Section 9. Several Obligations. The rights and undertakings of each Manufacturer and the rights and obligations of the Assignee with respect to each Manufacturer hereunder are several and not joint.

Section 10. Execution in Counterparts. This Assignment may be executed in any number of counterparts, all of which together shall constitute a single instrument. It shall not be necessary that any counterpart be signed by all of the parties hereto so long as at least one counterpart is signed by each party hereto. The Assignee agrees to deliver one of such counterparts, or a certified copy thereof, to the Vendee and the Lessee. Although this Assignment is dated for convenience as of the date first above written, the actual date or dates of execution hereof by the parties hereto is or are, respectively, the date or dates stated in the acknowledgments hereto annexed.

IN WITNESS WHEREOF, each Manufacturer and the Assignee have caused these presents to be executed in their respective corporate names by officers or representatives duly authorized, and their respective corporate seals to be affixed and duly attested, all as of the day, month and year first above written.

(Corporate Seal)

ACF INDUSTRIES, INC.

Attest:

By


\_\_\_\_\_  
Vice President


\_\_\_\_\_  
Assistant Secretary

ORTNER FREIGHT CAR COMPANY

Attest:

By

  
\_\_\_\_\_  
Vice President

  
\_\_\_\_\_  
Assistant Secretary

FIRST SECURITY BANK OF UTAH, N.A.,  
not in its individual capacity,  
but solely as Agent and Assignee

(Corporate Seal)

Attest:

By

\_\_\_\_\_  
Authorized Officer

\_\_\_\_\_  
Authorized Officer

STATE OF NEW YORK     )  
                              ) SS  
COUNTY OF NEW YORK    )

On this \_\_\_\_\_ day of \_\_\_\_\_, 1979, before me personally appeared \_\_\_\_\_, to me personally known, who, being by me duly sworn, says that he is a Vice President of ACF INDUSTRIES, INC., that one of the seals affixed to the foregoing instrument is the corporate seal of said corporation, that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and he acknowledged that the execution of the foregoing instrument was the free act and deed of said corporation.

\_\_\_\_\_  
Notary Public

(Seal)

My Commission Expires:

STATE OF OHIO         )  
                              ) SS  
COUNTY OF HAMILTON    )

On this 13<sup>th</sup> day of APRIL, 1979, before me personally appeared H. E. KENISTON, to me personally known, who, being by me duly sworn, says that he is a Vice President of ORTNER FREIGHT CAR COMPANY, that one of the seals affixed to the foregoing instrument is the corporate seal of said corporation, that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and he acknowledged that the execution of the foregoing instrument was the free act and deed of said corporation.

Howard E. Parr  
Notary Public

(Seal)

My Commission Expires:

HOWARD E. PARR  
Notary Public, State of Ohio  
My Commission Expires August 20, 1983

STATE OF UTAH                    )  
                                  )  SS  
COUNTY OF SALT LAKE         )

On this \_\_\_\_ day of \_\_\_\_\_, 1979, before me personally appeared \_\_\_\_\_, to me personally known, who, being by me duly sworn, says that he is an Authorized Officer of FIRST SECURITY BANK OF UTAH, N.A., that one of the seals affixed to the foregoing instrument is the corporate seal of said corporation, that said instrument was signed and sealed on behalf of said association by authority of its Board of Directors, and he acknowledged that the execution of the foregoing instrument was the free act and deed of said corporation.

(SEAL)

\_\_\_\_\_  
Notary Public

My Commission Expires:

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AGREEMENT AND ASSIGNMENT

Dated as of December 20, 1978

Among

ACF INDUSTRIES, INC.  
and  
ORTNER FREIGHT CAR COMPANY

Manufacturers

And

FIRST SECURITY BANK OF UTAH, N.A.  
Agent and Assignee

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(KATY No. 79-1)  
(100 Covered Hopper & 100 Gondola Cars)

## TABLE OF CONTENTS

<u>Section</u>	<u>Heading</u>	<u>Page</u>
Parties.....		1
1.	Assignment by Manufacturers.....	1
2.	Covenants and Agreements of Manufacturers.....	2
3.	Equipment Markings.....	4
4.	Recordation.....	4
5.	Conditions Precedent to Payments by Assignee.....	4
6.	Further Assignments.....	5
7.	Representation of Manufacturers; Further Assurances .....	5
8.	Governing Law.....	5
9.	Several Obligations.....	6
10.	Execution in Counterparts.....	6
Signature Page.....		6
Acknowledgments.....		7

## AGREEMENT AND ASSIGNMENT

AGREEMENT AND ASSIGNMENT dated as of December 20, 1978 among ACF INDUSTRIES, and ORTNER FREIGHT CAR COMPANY (hereinafter sometimes collectively referred to as the "Manufacturers" and individually as a "Manufacturer") and FIRST SECURITY BANK OF UTAH, N.A., acting not in its individual capacity but solely as agent and assignee under the Participation Agreement hereinafter referred to (said Bank as so acting being hereinafter called the "Assignee");

WHEREAS, the Manufacturers and FIRST MARYLAND LEASECORP (the "Vendee") have entered into a Conditional Sale Agreement dated as of December 20, 1978 (the "Conditional Sale Agreement") covering the construction, sale and delivery on the conditions therein set forth by the Manufacturers and the purchase by the Vendee of the railroad equipment described in Schedules A and B to the Conditional Sale Agreement (collectively the "Equipment" and individually an "Item" or "Item of Equipment"); and

WHEREAS, the Vendee and MISSOURI-KANSAS-TEXAS RAILROAD COMPANY (the "Lessee") have entered into an Equipment Lease dated as of December 20, 1978 (the "Lease") providing for the lease of the Equipment to the Lessee; and

WHEREAS, the Assignee, the Lessee, the Vendee and the institutional investors named therein in Schedule 1 thereto (the "Investors") have entered into a Participation Agreement dated as of December 20, 1978 (the "Participation Agreement") providing for the acquisition from the Manufacturers by the Assignee of the right, title and interest of the Manufacturers under the Conditional Sale Agreement, subject to the conditions set forth below.

NOW, THEREFORE, THIS AGREEMENT AND ASSIGNMENT (the "Assignment"):

### W I T N E S S E T H:

That, in consideration of the sum of One Dollar (\$1.00) and other good and valuable consideration paid by the Assignee to the Manufacturers, the receipt of which is hereby acknowledged, as well as of the mutual covenants herein contained:

Section 1. Assignment by Manufacturers. Each Manufacturer hereby assigns, transfers and sets over unto the Assignee, its successors and assigns:

(a) All the right, security title and interest of such Manufacturer in and to each Item of Equipment to be built by it when and as delivered and accepted and upon payment by the Assignee to such Manufacturer of the amount required to be paid under Section 5 hereof;

(b) All the right, title and interest of such Manufacturer in and to the Conditional Sale Agreement (except the right to construct and deliver the various Items of Equipment to be built by it pursuant to Sections 1 and 2.1 thereof and the right to receive the payments specified in Section 3.3(a) thereof and reimbursement for taxes paid or incurred by such Manufacturer and all rights to indemnity from the Vendee and/or the Lessee for claims arising against such Manufacturer), and in and to any and all amounts which may be or become due or owing to such Manufacturer under the Conditional Sale Agreement on account of the indebtedness in respect of the Purchase Price (as defined in the Conditional Sale Agreement) of the Equipment and interest thereon, and in and to any other sums becoming due from the Vendee under the Conditional Sale Agreement, other than those hereinabove excluded; and

(c) Except as limited above in subparagraph (b) hereof, all of such Manufacturer's rights, powers, privileges and remedies under the Conditional Sale Agreement;

without any recourse, however, against such Manufacturer for or on account of the failure of the Vendee to make any of the payments provided for in, or otherwise to comply with, any of the provisions of the Conditional Sale Agreement; provided, however, that this Assignment shall not subject the Assignee to, or transfer or pass, or in any way affect or modify the obligations of such Manufacturer to construct and deliver the various Items of Equipment in accordance with the Conditional Sale Agreement or with respect to its warranties and agreements contained in Sections 10.3 and 11 of the Conditional Sale Agreement or relieve the Vendee from its obligations to the Manufacturer under Sections 2, 3.3(a), 10 and 12 of the Conditional Sale Agreement, it being understood and agreed that notwithstanding this Assignment, or any subsequent assignment pursuant to the provisions of Section 12 of the Conditional Sale Agreement, all obligations of such Manufacturer to the Vendee shall be and remain enforceable by the Vendee, its successors and assigns, against and only against such Manufacturer. In furtherance of the foregoing assignment and transfer, each Manufacturer hereby authorizes and empowers the Assignee in the Assignee's own name, or in the name of the Assignee's nominee, or in the name of and as attorney, hereby irrevocably constituted, for such Manufacturer to ask, demand, sue for, collect, receive and enforce any and all sums to which the Assignee is or may become entitled under this Assignment and compliance by the Vendee with the terms and agreements on its part to be performed under the Conditional Sale Agreement, but at the expense and liability and for the sole benefit of the Assignee (it being understood that such agreement with respect to the expense and liability of enforcement shall in no event be construed as a waiver of the Assignee's rights with respect thereto under Section 15 of the Conditional Sale Agreement and Section 14.2 of the Lease (as defined in the Conditional Sale Agreement)).

Section 2. Covenants and Agreements of Manufacturers.  
Each Manufacturer covenants and agrees that it will deliver the



various Items of Equipment to be manufactured by it to the Vendee, in accordance with the provisions of the Conditional Sale Agreement, and that, notwithstanding this Assignment, it will perform and fully comply with each and all of the covenants and conditions of the Conditional Sale Agreement set forth to be performed and complied with by such Manufacturer. Each Manufacturer further covenants and agrees that it will warrant to the Assignee and the Vendee that at the time of delivery of each Item of Equipment to be manufactured by it to the Vendee under the Conditional Sale Agreement it had legal title to such Item and good and lawful right to sell such Item and the title to such Item was free of all claims, liens and encumbrances of any nature except only the right of such Manufacturer to receive payment of its invoice price therefor and the rights of the Vendee under the Conditional Sale Agreement and the rights of the Lessee under the Lease; and such Manufacturer further covenants and agrees that it will defend the title to such Item against the demands of all persons whomsoever based on claims originating prior to said delivery of such Item by such Manufacturer to the Vendee; all subject, however, to the provisions of the Conditional Sale Agreement and the rights of the Railroad thereunder and of the Lessee under the Lease.

Each Manufacturer covenants and agrees with the Assignee that in any suit, proceeding or action brought by the Assignee under the Conditional Sale Agreement for any installment of, or interest on, indebtedness in respect of the Purchase Price of the Equipment or to enforce any provision of the Conditional Sale Agreement, such Manufacturer will indemnify, protect and hold harmless the Assignee from and against all expense, loss or damage suffered by reason of any defense, set-off, counterclaim or recoupment whatsoever of the Vendee arising out of a breach by such Manufacturer of any obligation with respect to the Equipment or the manufacture, construction, delivery or warranty thereof by such Manufacturer, or under Sections 10 or 11 of the Conditional Sale Agreement, or by reason of any defense, set-off, counterclaim or recoupment whatsoever arising by reason of any other indebtedness or liability at any time owing to the Vendee by such Manufacturer. Each Manufacturer's obligation so to indemnify, protect and hold harmless the Assignee is conditional upon (a) the Assignee's timely motion or other appropriate action, on the basis of Section 12.4 of the Conditional Sale Agreement, to strike any defense, set-off, counterclaim or recoupment asserted by the Vendee in any such suit, proceeding or action and (b) if the court or other body having jurisdiction in such suit, proceeding or action denies such motion or other action and accepts such defense, set-off, counterclaim or recoupment as a triable issue in such proceeding or action, the Assignee's prompt notification to the Manufacturer of the asserted defense, set-off, counterclaim or recoupment and the Assignee's giving such Manufacturer the right, at such Manufacturer's expense, to compromise, settle or defend against such defense, set-off, counterclaim or recoupment. Any and all such obligations shall be and remain enforceable according to their merits by the Vendee or the Lessee against and only against the Manufacturers and shall not be enforceable against the Assignee or any party or parties in whom security title to the Equipment or any unit

thereof or any of the rights of the Manufacturers under the Conditional Sale Agreement shall vest by reason of this Assignment or of successive assignments. The Assignee will give notice to the Manufacturers of any suit, proceeding or action by the Assignee herein described.

Except in cases of designs, systems, processes, formulas or combinations specified by the Vendee or the Lessee and not developed or purported to be developed by the Manufacturer, and articles and materials specified by the Vendee and the Lessee and not manufactured by the Manufacturer, each Manufacturer agrees to indemnify, protect and hold harmless the Assignee from and against any and all liability, claims, demands, costs, charges and expenses, including reasonable royalty payments and counsel fees, in any manner imposed upon or accruing against the Assignee or its assigns because of the use in or about the construction or operation of the Equipment, or any Item thereof, of any design, system, process, formula, combination, article or material which infringes or is claimed to infringe on any patent or other right. The Assignee will give notice to the Manufacturer of any claim actually known to the Assignee which is based upon any such alleged infringement and will give the Manufacturer the right, at the Manufacturer's expense, to compromise, settle or defend against such claim.

Each Manufacturer agrees that any amount payable to it by the Vendee or the Lessee, whether pursuant to the Conditional Sale Agreement or otherwise, not hereby assigned to the Assignee, shall not be secured by any lien or charge on any Item of Equipment.

Section 3. Equipment Markings. Each Manufacturer will cause to be plainly, distinctly, permanently and conspicuously marked by a plate or stencil in contrasting color on both sides of each Item of Equipment to be built by it, at the time of delivery thereof to the Vendee, in letters not less than one inch in height, the following legend:

"Unit Subject to Security Interest of  
Agent Bank under Conditional Sale Agreement  
Recorded with the I.C.C."

Section 4. Recordation. Upon request of the Assignee, its successors and assigns, each Manufacturer will execute and deliver all instruments which may be necessary or proper in order to discharge of record the Conditional Sale Agreement or any other instrument evidencing any interest of such Manufacturer therein or in the Equipment.

Section 5. Conditions Precedent to Payments by Assignee. Subject to the conditions set forth in the Participation Agreement, the Assignee, on or before noon on each Closing Date fixed as provided in Section 3.4 of the Conditional Sale Agreement with respect to a Group (as defined in Section 3.2 of said Agreement) of Equipment, shall pay to the Manufacturer at the office of the Assignee at 79 South Main Street, Salt Lake City, Utah, Attention: Corporate Trust Department, an amount equal to 66.7407% of the aggregate Purchase Price for all Items of Equipment in such Group for

which settlement is then being made, provided that the obligation of the Assignee hereunder to make payment for any Group of Equipment is hereby expressly conditioned upon the prior timely receipt by the Assignee, pursuant to the Participation Agreement, of all the funds to be furnished to the Assignee by the various parties to the Participation Agreement with respect thereto and evidence reasonably satisfactory to it and its counsel that each of the conditions precedent set forth in the Participation Agreement have been met. In the event that the Assignee shall not make any such payment, the Assignee shall reassign to the Manufacturer, without recourse to the Assignee, all right, security title and interest of the Assignee in and to the Items of Equipment with respect to which payment has not been made by the Assignee.

It is understood and agreed that the Assignee shall not be required to make any payment with respect to any Items of Equipment excluded from the Conditional Sale Agreement pursuant to Sections 2.3 and 3.1 thereof.

Section 6. Further Assignments. Subject to the terms and provisions of the Participation Agreement, the Assignee may assign in the entirety all of its rights under the Conditional Sale Agreement, including the right to receive any payments due or to become due to it from the Vendee thereunder. In the event of any such assignment each such subsequent or successive assignee shall, to the extent of such assignment, enjoy all the rights and privileges and be subject to all the obligations of the Assignee hereunder.

Section 7. Representation of Manufacturers; Further Assurances. Each Manufacturer hereby:

(a) represents and warrants to the Assignee, its successors and assigns, that the Conditional Sale Agreement was duly authorized and lawfully executed and delivered by it for a valid consideration, that (assuming due authorization, execution and delivery by the other parties thereto) it is a valid and existing agreement binding upon such Manufacturer and the other parties thereto, and that it is now in force without amendment thereto; and

(b) covenants and agrees that it will from time to time and at all times, at the request of the Assignee or its successors or assigns, make, execute and deliver all such further instruments of assignment, transfer and assurance and do such further acts and things as may be necessary and appropriate in the premises to give effect to the provisions hereinabove set forth and more perfectly to confirm the rights, security titles and interests hereby assigned and transferred to the Assignee or intended so to be.

Section 8. Governing Law. The terms of this Assignment and all rights and obligations hereunder shall be governed by the laws of the State of Maryland; provided, however, that the parties

shall be entitled to all the rights conferred by 49 USC Section 11303 of the Interstate Commerce Act and such additional rights arising out of the filing, recording or depositing of the Conditional Sale Agreement and this Assignment as shall be conferred by the laws of the several jurisdictions in which the Conditional Sale Agreement or this Assignment shall be filed, recorded or deposited.

Section 9. Several Obligations. The rights and undertakings of each Manufacturer and the rights and obligations of the Assignee with respect to each Manufacturer hereunder are several and not joint.

Section 10. Execution in Counterparts. This Assignment may be executed in any number of counterparts, all of which together shall constitute a single instrument. It shall not be necessary that any counterpart be signed by all of the parties hereto so long as at least one counterpart is signed by each party hereto. The Assignee agrees to deliver one of such counterparts, or a certified copy thereof, to the Vendee and the Lessee. Although this Assignment is dated for convenience as of the date first above written, the actual date or dates of execution hereof by the parties hereto is or are, respectively, the date or dates stated in the acknowledgments hereto annexed.

IN WITNESS WHEREOF, each Manufacturer and the Assignee have caused these presents to be executed in their respective corporate names by officers or representatives duly authorized, and their respective corporate seals to be affixed and duly attested, all as of the day, month and year first above written.

(Corporate Seal)

ACF INDUSTRIES, INC.

Attest:

By

\_\_\_\_\_  
Vice President

\_\_\_\_\_  
Assistant Secretary

ORTNER FREIGHT CAR COMPANY

Attest:

By

\_\_\_\_\_  
Vice President

\_\_\_\_\_  
Assistant Secretary

(Corporate Seal)

FIRST SECURITY BANK OF UTAH, N.A.,  
not in its individual capacity,  
but solely as Agent and Assignee

Attest:

By

  
\_\_\_\_\_  
Authorized Officer

  
\_\_\_\_\_  
Authorized Officer

STATE OF NEW YORK     )  
                              ) SS  
COUNTY OF NEW YORK    )

On this \_\_\_\_ day of \_\_\_\_\_, 1979, before me personally appeared \_\_\_\_\_, to me personally known, who, being by me duly sworn, says that he is a Vice President of ACF INDUSTRIES, INC., that one of the seals affixed to the foregoing instrument is the corporate seal of said corporation, that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and he acknowledged that the execution of the foregoing instrument was the free act and deed of said corporation.

\_\_\_\_\_  
Notary Public

(Seal)

My Commission Expires:

STATE OF OHIO         )  
                              ) SS  
COUNTY OF HAMILTON    )

On this \_\_\_\_ day of \_\_\_\_\_, 1979, before me personally appeared \_\_\_\_\_, to me personally known, who, being by me duly sworn, says that he is a Vice President of ORTNER FREIGHT CAR COMPANY, that one of the seals affixed to the foregoing instrument is the corporate seal of said corporation, that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and he acknowledged that the execution of the foregoing instrument was the free act and deed of said corporation.

\_\_\_\_\_  
Notary Public

(Seal)

My Commission Expires: